

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-569
32311

In re Applications of)
)
MARTHA J. HUBER) File No. BPH-911114ME
)
RITA REYNA BRENT) File No. BPH-911115MC
)
MIDAMERICA ELECTRONICS SERVICE, INC.) File No. BPH-911115ML
)
STATON COMMUNICATIONS, INC.) File No. BPH-911115MU
)
For Construction Permit for a)
New FM Station on Channel 234A)
in New Albany, Indiana)

SEP 3 3 1993
FCC MAIL SECTION
DIGITALLY SIGNED BY

MEMORANDUM OPINION AND ORDER

Issued: September 02, 1993

Released: September 03, 1993

Background

1. This is a ruling on Motion To Enlarge Issues Against Martha J. Huber that was filed by Staton Communications, Inc. ("Staton") on July 22, 1993. An Opposition was filed on August 4, 1993, by Martha J. Huber ("Huber"). There has been no Reply filed by Staton.¹

2. Staton seeks the following issues:

To determine whether Martha J. Huber made misrepresentations or lacked candor when she certified in her original application that she was financially qualified.

Facts

3. There is a pending financial qualification issue that was added against Huber. See Memorandum Opinion And Order FCC 93M-314, released June 1, 1993. The Presiding Judge specifically rejected the addition of a misrepresentation issue against Huber at that time because:

The motions are based solely on inferences to be drawn from a bank letter and there are no affidavits which reflect facts sufficient to raise a substantial question of an intended misrepresentation. Id. at Para. 2.

¹ The parties have reached in principle the terms of a universal settlement. However, Staton was not relieved of its obligation to file a Reply pleading by virtue of the stay of procedures in connection with the settlement. See Order FCC 93M-541, released August 20, 1993, at fn.2.

4. Staton contends that there is newly discovered evidence which reinforces adverse implications and which tends to show that Huber falsely certified knowing that the bank's loan commitment was unreliable, i.e., an accommodation. Such new evidence is the negative inference to be drawn from Huber's failure to produce any personal financial statements on which the bank could have relied in issuing its letter. The most significant event, according to Staton, is the bank's obtaining of Huber's personal financial statement the month after the bank issued its letter. Staton asserts that this after-the-fact consideration of Huber's financial statements raises a substantial issue of accommodation by the bank's letter of October 1991 which was relied on by Huber when she certified.

5. There are other characteristics of the bank's letter which Staton contends indicate an unreliability. The letter states that the bank "would be interested" in making a loan which Staton contends is more in the nature of an invitation to apply for a loan in the future. Huber's bank letter also failed to specify an interest rate (pegging the rate at 1% above prime). And the term of the loan was not specified in the letter. In addition, the letter does not reference a review of financials, credit worthiness or business plans. And the letter does not reflect that there was a familiarity with Huber's financial condition based on an on-going banking relationship.

6. On May 5, 1993, the bank issued a new letter to "amplify" the earlier letter which states that the assurance given in October 1991 was based on the bank's knowledge of Ms. Huber's financial condition and the current interest rates for October 1991 (8%) and May 1993 (6%) are stated. By the earlier reference to "a period as long as two to five years" the bank meant that a loan period of a minimum of two years and a maximum of five years would be acceptable to the bank. Staton does not object to the bank's letter of May 1993 but asserts that the later letter does not "rectify the false certification" that was made that was based on the bank's alleged letter of accommodation of October 1991.

7. In connection with her Opposition, Ms. Huber provides an affidavit of Mr. Leo Tierney, the officer of PNC Bank who signed both letters. The Tierney affidavit states:

Since October, 1991 and continuing [to] date, it has been and continues to be the present firm intention of the Bank to make the loan to Ms. Huber.

And Mr. Tierney states in the bank letter of May 1993:

[Y]ou have been a customer of this bank for over twenty-five years, and this bank was well aware of your financial condition in October 1991 and remains familiar with your financial condition today.

There is no inference to be drawn from the circumstances and no affidavit or deposition transcript was submitted which raises a substantial question of misrepresentation on the part of Mr. Tierney.

Discussion

8. The Presiding Judge previously considered a request to add a misrepresentation issue in connection with Huber's financial certification and the request was denied. See Memorandum Opinion And Order 93M-314, supra. Cf. Memorandum Opinion And Order 93M-276, released May 18, 1993 (request for misrepresentation issue against Midamerica denied). The Commission's rules specifically preclude the reconsideration of interlocutory rulings by presiding judges. See 47 C.F.R. §§1.102(b)(2) and 1.106(a)(1) (petitions for reconsideration of interlocutory actions will not be entertained). Staton contends that since the second request was based on discovery made after the first denial, there would be no reconsideration if the misrepresentation issue were added. However, that argument applies only if relevant substantial new evidence is disclosed in discovery. Compare Memorandum Opinion And Order FCC 93M-558, released September 1, 1993 (misrepresented financial qualification issue added against Staton based in part on Ms. Staton's sworn deposition testimony which was considered with related evidence to support a first-time requested real party-in interest issue).

9. In this ruling, the only significant newly discovered evidence is the documentation which reflects that the bank obtained post-certification financial statements one month after the application was filed by Huber. Staton never took the deposition of the bank to determine why a financial statement on the bank's form was obtained after the certification. The inference can equally be made that the bank was merely following a procedure that would be needed before a loan was made. Staton asks for an issue without affidavit or deposition testimony which would be based on the speculative inference that the bank was issuing an accommodation letter in October 1991. That inference could not be drawn based on the bank's May 1993 letter in which Mr. Tierney states that Ms. Huber was a long-time customer who was known to the bank. The Commission has held that financial issues must not be added on speculation. Priscilla L. Schwier, 4 F.C.C. Rcd 3659 (Comm'n 1989). There is an added inhibition against adding a speculative misrepresentation issue which requires the added element of proving by substantial evidence that there was an intent to deceive. Fox River B/cstg Co., 93 F.C.C.2d 127, 129 (Comm'n 1983).

10. Finally, the rejection of a misrepresentation issue is based on the Commission's rule which specifically requires that a motion to enlarge must be filed within thirty days of the issuance of a designation order, except that motions based on newly discovered evidence must be filed within fifteen days of the new discovery. 47 C.F.R. §1.229 (b). Staton has not made a showing of good cause for filing late and late-filed petitions for added issues will not be granted without an affidavit setting forth specific allegations of fact which is based on personal knowledge. 47 C.F.R. §1.229 (c). There has been no affidavit or transcript of deposition testimony offered by Staton.

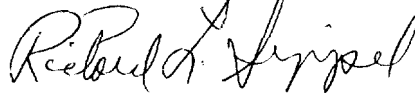
Conclusion

11. There has been no substantial question of fact raised with respect to any alleged misrepresentation or lack of candor in connection with the financial certification of Martha J. Huber. Therefore, no misrepresentation issue will be added against Huber and the Motion To Enlarge Issues Against Martha J. Huber filed by Staton on July 22, 1993, will not be granted. See Frank Digesu, Sr., 7 F.C.C.Rcd 5459, 5460 (Comm'n 1992).

Ruling

Accordingly, for the foregoing reasons, the Motion To Enlarge Issues Against Martha J. Huber filed by Staton Communications, Inc. on July 22, 1993, IS DENIED.²

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

² However, the financial qualification issue added earlier against Huber remains to be resolved if the parties intend to rely on the Huber application as the vehicle for a merger incident to the proposed settlement. In other words, there must be a viable application with a proposal that qualifies for the grant.